STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2003
v	No. 237820 Oakland Circuit Court
RICKY L. NELSON, Defendant-Appellant.	LC No. 2001-178246-FC

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with possession with intent to deliver cocaine after a bag he had in his possession at the time of his arrest was found to contain a large quantity of cocaine. Prior to trial, defendant moved to have the cocaine weighed by an independent laboratory. The trial court granted the request on the condition that defendant pay the costs involved with transporting the cocaine to the laboratory. Defendant objected, but requested no remedy. Defendant failed to file a witness list. Nevertheless, the prosecution waived notice as to one witness, David Castelew.

The police received information that defendant was a narcotics dealer and that he would be at a specific residence at some point during the evening of April 6, 2001. The police established a surveillance of the residence. At approximately 11:30 p.m. a vehicle arrived at the residence. Defendant exited the vehicle and approached the residence. He was carrying a plastic bag, which he dropped to his feet as the police approached and arrested him. The bag contained a box, which held cocaine. The cocaine weighed 952.7 grams, and had a street value of between $20,000 and $35,000. Defendant waived his *Miranda*[1] rights, but refused to answer various questions and refused to acknowledge that he had a bag in his possession when he was arrested.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant testified on his own behalf. He stated that as he walked to his residence the police approached him shouting racial slurs[2] and ordered him to get on the ground. He asserted that he never saw the bag or the box containing the cocaine before he appeared in court and maintained that he was charged with the narcotics offense because in 1999 he refused to become an informant for the police. On cross-examination, defendant stated that Castelew was the person who drove defendant to his residence on the evening he was arrested and that Castelew would know that he did not have a bag in his possession when he left the vehicle. Over objection, the prosecutor inquired whether defendant asked Castelew to testify. Defendant stated that he had, but that Castelew was unavailable. Defendant testified that he did not ask Castelew to make a statement to the police.

On rebuttal, an officer testified that, in 1999, defendant was riding as a passenger in a vehicle. Cocaine was found on the street approximately fifty to one hundred feet from the vehicle. Defendant was not charged with a crime due to lack of sufficient evidence. He refused to work as a police informant. The jury found defendant guilty of the charged offense. The trial court sentenced defendant to twenty-five to fifty years in prison, with credit for forty-nine days.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he was denied the effective assistance of counsel at trial. He contends that counsel's failure to file a witness list and to have the cocaine weighed by an independent laboratory deprived him of a substantial defense. In addition, he asserts that counsel rendered ineffective assistance by failing to request a limiting instruction after the introduction of damaging other acts evidence in the form of cross-examination regarding the details of the 1999 incident and the rebuttal testimony.

We disagree. Defendant did not move for a new trial in the trial court or file a motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). The failure to call witnesses or to present other evidence constitutes ineffective assistance only when it deprives the defendant of a substantial defense. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Defendant asserts that counsel knew of witnesses who would testify that the amount of cocaine involved in the incident was less than what was

[2] This allegation was denied by a police officer on rebuttal.

testified to by the police. However, defendant's theory was that he never possessed any amount of cocaine on April 6, 2001, and that the police framed him to exact revenge for his refusal to become an informant in 1999.

The alleged deficiencies of failure to call Castelew and failure to obtain an independent weighing of the cocaine was trial strategy designed to bolster defendant's claim that he was not guilty of any offense. We do not substitute our judgment for that of counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, given that the other acts evidence provided the basis for defendant's theory that he was framed by the police and was properly admitted, it is likely that counsel determined that an instruction limiting the jury's consideration of this evidence would have diminished the defense. We conclude that counsel's failure to seek a limiting instruction was trial strategy. *Id*.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity with it, but may be admissible for other purposes, such as to show proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. MRE 404(b)(a). The other crimes, wrongs, or acts may be contemporaneous with or prior to or subsequent to the conduct at issue. *Id*. To be admissible, other acts evidence must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). The admissibility of other acts evidence is within the discretion of the trial court. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party and tending to weaken or impeach that evidence. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). Whether rebuttal evidence is proper depends on the proofs introduced by the defendant, and not merely to what he testified on cross-examination. *Id*. If the evidence responds to evidence introduced by or to a theory developed by the defendant, it is proper rebuttal. *Id.* The admission of rebuttal evidence is within the discretion of the trial court. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Defendant argues that the trial court abused its discretion by allowing the prosecutor to introduce evidence regarding the details of the 1999 incident through questions directed to him on cross-examination and through rebuttal testimony. He asserts that evidence regarding the details of the incident was irrelevant and was improper as it had as its sole purpose to demonstrate his propensity to commit narcotics-related offenses.

We disagree. Defendant voluntarily injected the issue of the 1999 incident when he testified on direct examination that he believed that his refusal to become an informant motivated the police to frame him. Defendant referred to the incident in general terms, but clearly stated that he had contact with the police in 1999. The prosecution sought to introduce evidence concerning the facts of the incident in order to weaken defendant's claim that the police had a vendetta against him. The evidence was admissible under MRE 404(b)(1) and was proper rebuttal evidence. *Starr, supra*; *Pesquera, supra*. Furthermore, defendant opened the door to evidence regarding the details of the incident. He has waived any claim of error. *People v Williams*, 84 Mich App 226, 229; 269 NW2d 535 (1978).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. *Id*. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by the defendant. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant argues that the prosecutor denied him due process and a fair trial by improperly shifting the burden of proof. He contends that the prosecutor's questions regarding whether he asked Castelew to testify or to make a statement to the police on his behalf were improper in light of the fact that he had no obligation to present any evidence. We disagree. A prosecutor may not shift the burden of proof, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), but may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Defendant testified that Castelew would know that he was not carrying a bag when he was apprehended. The prosecutor's questions were designed to illustrate that defendant's assertions that he did not have a bag in his possession and that the police framed him were not credible. The questions did not improperly shift the burden of proof. *Fields*, *supra* at 112, 117. Furthermore, any prejudice created by the questions could have been cured by a timely instruction. Reversal is not warranted. *Leshaj*, *supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood